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Supreme Court of the United States

OCTOBER TERM, 1943

No.

1005

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46TH STREET THEATRE CORP. and
SELECT OPERATING CO. INC.,

Petitioners,

against

ROBERT WM. CHRISTIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, AND BRIEF IN SUPPORT THEREOF

MILTON R. WEINBERGER,
Counsel for Petitioners.

WILLIAM KLEIN,
ADOLPH LUND,
Of Counsel.

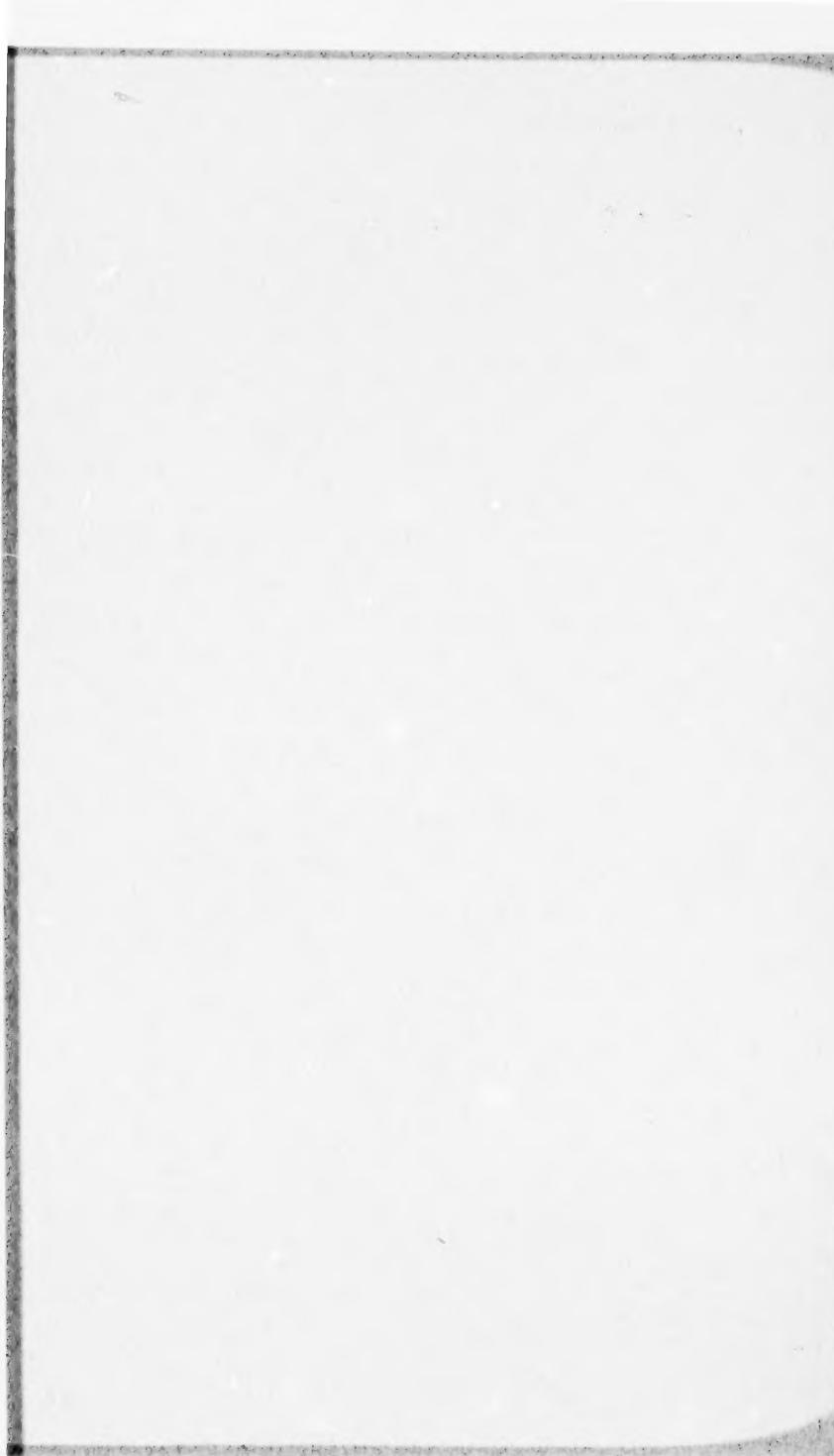


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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

Petitioners, 46th Street Theatre Corp. and Select Operating Co. Inc., respectfully pray for a writ of certiorari to review the final judgment of the Supreme Court of the State of New York wherein it was adjudged that Chapter 893 of the Laws of 1941 (Section 40-b, Civil Rights Law) of the State of New York, is not repugnant to the Fourteenth Amendment of the Constitution of the United States.

Summary Statement of the Matter Involved

This action was brought to recover a \$500 penalty fixed by Section 41 of the Civil Rights Law (Consolidated Laws Chapter 6) for violation of Section 40-b of the Civil Rights Law of the State of New York (Chapter 893 of the Laws of 1941).

Section 40-b of the Civil Rights Law provides that persons or corporations conducting a place of entertainment and amusement of the character later defined, are forbidden to "refuse to admit to any public performance held at such place any person over the age of twenty-one years who presents a ticket of admission to the performance a reasonable time for the commencement thereof; * * * but nothing in this action contained shall be construed to prevent the refusal of admission to * * * any person whose conduct or speech thereat or therein is abusive or offensive or of any person engaged in any activity which may tend to a breach of the peace. The places of public entertainment and amusement within the meaning of this Section shall be legitimate theatres, burlesque theatres, music halls, opera houses, concert halls and circuses."

Respondent purchased a ticket of admission to the 46th Street Theatre in New York City for the evening performance of May 27, 1941 of the musical production "Panama Hattie." When respondent sought to enter the theatre, admission was refused him by petitioners who are the owners and operators of said theatre. Petitioners offered to refund the purchase price. In the action instituted by respondent to recover the penalty provided by Section 41, Civil Rights Law, petitioners admitted the allegations of the complaint as to the refusal to admit respondent, that respondent's conduct or speech was not abusive or offensive, that respondent was not engaged in any activity which

might tend to a breach of the peace. Petitioners pleaded affirmatively that Section 40-b of the Civil Rights Law was unconstitutional as being in contravention of the Fourteenth Amendment of the Constitution of the United States (fol. 24). *(page 5)*

The action was tried before the Supreme Court of the State of New York, County of Schenectady, without a Jury. It was proved that during the past thirty-five years or so there had been but two or three isolated instances of exclusions of ticket holders from legitimate theatres in New York (fols. 62-65; 67-70; 78-80; 88-89). There never prevailed any general condition of exclusion of ticket holders (fols. 145-150). The Trial Justice held the statute constitutional. He rendered judgment for the plaintiff and in his opinion, a copy of which is appended hereto, said:

"The facts are not disputed, but the defendants insist that there can be no recovery herein because of the unconstitutionality of Section 40-b of the Civil Rights Law."

Judgment was entered in the Supreme Court, County of Schenectady, on December 20, 1941 in favor of plaintiff. Upon appeal to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, that Court unanimously affirmed. In its opinion, a copy of which is appended hereto, and which is reported in 265 App. Div. 225, the Court said:

"Appellants attack the constitutionality of the statute, urging that it violates their rights to equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States * * *."

Judgment of affirmance was entered in the Supreme Court, County of Schenectady, on January 5, 1943. Appeal from the aforesaid judgments was taken to the Court

of Appeals of the State of New York, the highest Court in the State in which a decision in the suit could be had, as a matter of right upon the ground that the Constitution of the United States was involved (Section 588, Civil Practice Act of the State of New York). The Court of Appeals affirmed the judgments appealed from without opinion (292 N. Y. 520). The order of affirmance dated February 24, 1944 was made the order of the Supreme Court by order dated March 20, 1944, and judgment of affirmance was entered in the said Supreme Court on March 20, 1944. It is from the determination of the Court of Appeals that petitioners pray for a writ of certiorari.

The sole question sought to be reviewed by this Honorable Court is whether a State, may, by statute, require operators of legitimate theatres, and similar places of entertainment to admit all adult persons, in absence of offensive conduct, and presenting tickets of admission a reasonable time before the commencement of the performance, without imposing a similar requirement upon the proprietors of all places of public entertainment, particularly motion picture theatres, where there is no showing that there was either a general evil of refusal of admission, nor that such evil was peculiar to legitimate theatre and similar places of entertainment included in the act.

Jurisdiction

The date of the decision of the Court of Appeals of the State of New York of which review is here sought, is February 24, 1944. The original remittitur is dated February 24, 1944. The remittitur was thereafter amended by order of the Court of Appeals dated April 13, 1944. An order making the order of affirmance of the Court of Appeals the order of the Supreme Court of the State of New York was

entered in the Supreme Court on the 20 day of March, 1944. Judgment on the remittitur was entered in the Supreme Court of the State of New York on the 20 day of March, 1944.

The statute granting the power to review herein is Judicial Code, Section 237(a)(b), United States Code, Title 28, Section 344(a)(b). There is here involved the constitutionality of Section 40-b of the Civil Rights Law of the State of New York, Chapter 893 of the Laws of 1941 of the State of New York. The statute is set forth at length in the appendix. The amended remittitur of the Court of Appeals recites that "A question under the Federal Constitution was presented and necessarily passed upon by this Court. The appellant contended that Chapter 893 of the Laws of 1941 (Section 40-b, Civil Rights Law) of the State of New York is repugnant to the Fourteenth Amendment of the Constitution of the United States. This Court held that the aforesaid law is not repugnant to the Fourteenth Amendment of the Constitution of the United States."

A final judgment has been entered in this cause by the Supreme Court of the State of New York on remittitur of the Court of Appeals of the State of New York, the highest Court of the State of New York, in which a decision in the suit could be had.

Reasons for Issuance of Writ

(1) The Court of Appeals of the State of New York has decided a highly important case in which it necessarily passed upon the question of whether the State statute was repugnant to the Fourteenth Amendment of the Constitution of the United States. There is presented a matter of

the greatest importance to legitimate theatrical interests and other similar interests specified in the statute, involving investments of millions of dollars. Petitioners claim that legitimate theatres have been discriminated against in favor of places of entertainment excluded from the Act.

(2) This was the first time that this question was presented to the State Court of Appeals and if this Court grant certiorari it will be the first time that this Court will consider the question of whether the State statute is repugnant to the Fourteenth Amendment of the Constitution of the United States.

(3) The decision of the Supreme Court of the State of New York, as affirmed by the decision of the Court of Appeals of the State of New York is in conflict with decisions of this Court and in petitioners' opinion directly in conflict with the decision in this Court in *Western Turf Association v. Greenberg*, 204 U. S. 359.

46TH STREET THEATRE CORP.

and

SELECT OPERATING CO. INC.,

Petitioners

by MILTON R. WEINBERGER,

Counsel.

